SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM 1975

Case No. 75-1287

ANCHORAGE OFFICE BUILDING COMPANY,
A Limited Partnership,

and

ANCHORAGE-HYNNING & Co., A Limited Partnership,

and

CLIFFORD J. HYNNING, Trustee for and
Managing General Partner of said limited Partnerships,
Petitioners

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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III. The trial court denied justice to Anchorage by discarding the law of the case as laid down by the trial court itself in its order of 14 June, 1973, which delineated therein, in detail, the causes of action, on which Anchorage had a right to rely at trial, and did so rely; and the trial court justified its judgment by reasons and authorities so wholly and deliberately at variance with the law of the case, as formulated by the trial court itself in its 1973 order, as to suggest the applicability of Llewellyn's charge of a "sin against the nature of our case law." 28

IV. [Note: Essentially defensive, this reason is presented as a ground on which the writ should not be denied on the basis of "consent," but is hardly a reason sufficient, without reference to reasons, I, II, and III, to grant the writ.]
The trial court's conclusion that Anchorage had consented to much of Metro's interference with the use of its office building is predicated upon two conjoint errors:

(1) a contrived interpretation of a letter carefully drawn by Anchorage under Article 22 of the D.C. Building Code, which related to underpinning by Metro's contractors, and nothing more (as specifically disavowed in a contemporaneous letter by Metro's counsel); and

(2) an inherently incredible finding of fact of the "90-day wonder" performance by Metro's contractors, specifically at variance with the written admission by Metro's counsel at pre-trial that access was denied for 180 days. Neither error proved harmless, for their conjunction lent a color of plausibility to the trial court's rejection of Anchorage's claim as unfounded in law and fact 34

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WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Anchorage Office Building Company, Anchorage-Hynning & Co., and Clifford J. Hynning (hereinafter called "Anchorage"), pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The trial court issued two opinions—(a) an opinion supporting its order dated 14 June, 1973, denying the

first motion by Washington Metropolitan Area Transit Authority (hereinafter called "Metro") to dismiss, is unreported and is set forth in the Appendix (at p. A-1), and (b) the trial court's final judgment granting Metro's second motion to dismiss on 2 October, 1974, also unreported, and is set forth in the Appendix (at p. A-8). The third "opinion" is a one-page judgment on 3 December, 1975, by the Court of Appeals, also unreported, and is set forth in the Appendix (at p. A-20).

JURISDICTION

This petition was filed within the extended time (12 March, 1976) fixed by order of the Chief Justice of the United States, dated 26 February, 1976. The date of the judgment of the Court of Appeals for the District of Columbia Circuit is 3 December, 1975. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In an action for damages by the owners of an office building against Metro for the prolonged interference of subway construction with the use of the Anchorage Office Building, resulting in a partial taking of property and its use and in breach of rights of easement for access, light and air, sounding in public and private nuisances, Anchorage considers the following issues are presented:

1. Did Metro's interference for a period of two and one-half years with the use of an office building constitute

(a) a taking compensable under the Fifth Amendment only if the "deprivation which they [i.e., Anchorage] sustained was of such a permanent or complete nature," as the trial court held, and, failing proof of either "permanence" or "completeness," Metro's interference is merely "the price which people [i.e., again

Anchorage] must pay for public improvements," as the trial court concluded, or

(b) a burden on Anchorage as a private property owner for the benefit of the public as a whole, for which, in fairness and justice, compensation is due under the Fifth Amendment, or, alternatively, as a public and private nuisance under tort law?

2. Was a fair trial of the constitutional issue of a taking of private property denied by trial court in ordering a bifurcated trial separating liability and damages, suspending discovery on damages (including special damages) and directing the exclusion of evidence of damages (again including special damages), and nonetheless holding that Anchorage had failed to produce at trial sufficient evidence of serious deprivation or substantial or special damages?

3. Did the trial court deny justice to Anchorage by discarding, without notice and after the closing of Anchorage's proof, the law of the case, as set forth in its earlier written order of 14 June, 1973, sustaining the sufficiency of the complaint in specified particulars, on which Anchorage relied in presenting its evidence at trial?

4.[1] Was it harmless error for the trial court to conclude that Anchorage had consented to much of Metro's interference with the use of its property, and thereby waived its claim to damages, on the basis of the two conjoint errors of

(a) the trial court's contrived interpretation of a letter agreement between the parties made specifically

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[1] Note: Essentially defensive, this question presents a ground on which the writ should not be denied on the basis of "consent," but is hardly sufficient, without reference to I, II, and III, above, to grant the writ.

pursuant to Article 22 of the D.C. Building Code, which related exclusively to underpinning; conjoined with

(b) the "90-day wonder" factual finding that "during the underpinning activity, a period of approximately 90 days, there was no direct access" to the Anchorage from Connecticut Avenue, notwithstanding the written admission by Metro's counsel at pre-trial (incorporated in the magistrate's pre-trial order) that access "was not available from Connecticut Avenue . . . for a period of 180 days"?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States, which reads, in part, as follows:

> ". . . nor shall private property be taken for public use, without just compensation."

2. Article 22 of the D.C. Building Code (pp. 186-187) reads, in part, as follows:

ARTICLE 22—UNDERPINNING

> 3-785 Definition. By underpinning is meant such method of construction as will transmit the foundation load directly through the underpinning structure to such lower level as is necessary to secure the structure and which will relieve the adjacent ground and structure from undue lateral pressures.
>
> 3-786 Responsibility. Whenever excavation is carried to a depth which is below the adjoining premises, the person who causes such excavation to be made shall, if given the written permission to enter the adjoining premises, at all times and at his own expense, preserve and protect from injury any structure the safety of which may be affected by such part of the excavation, and such person shall

provide support for the adjoining structure by proper foundations. If the necessary written permission is not given to the person causing the excavation to be made, it shall be the duty of the owner who fails to give such written permission to make the structure safe, and to provide support for such structure by proper foundations, and such owner shall, if it is necessary for such purpose, be given the written permission to enter the premises where such excavation is to be made. In case of party walls erected in the original city of Washington and/or party walls erected with written consent of the adjoining owners, the person causing such excavation need not obtain the written permission to provide proper foundations for the adjoining structure.

STATEMENT OF THE CASE

This case comes to the Supreme Court on a *per curiam* affirmance of the judgment of the trial court which granted Metro's second motion to dismiss. The opinion of the Court of Appeals cited only the Federal Rules of Civil Procedure on appellate non-interference with a lower court's findings of fact or conclusions of law as harmless errors, and stamped the one-page judgment "NOT TO BE PUBLISHED."

Metro, officially the Washington Metropolitan Area Transit Authority, was created by an interstate compact among the District of Columbia, Maryland and Virginia, to which Congress gave its consent in P.L. 89-774, 80 Stat. 1324, as "a body corporate and politic" (para. 4), with specific authority to sue and be sued and is specifically made "liable for its contracts and for its torts" (para. 80). Anchorage has not challenged Metro's functions in planning developing, financing and operating modern transit facilities as highly laudable and ultimately beneficial to the Washington area. It was precisely for these reasons that Anchorage specifically dis-

avowed seeking injunctive relief and limited its prayers for relief to damages.

The Anchorage building is located at the southeast corner of Connecticut Avenue and Que Street and stretches to the west side of 19th Street, N.W., with the building's principal ingress and egress from Connecticut Avenue on Que Street (eastbound vehicular traffic only). Only an emergency exit (fire escape), not an entrance, is available on 19th Street.

Striking evidence at trial of the extensive interference by Metro construction activities with the Anchorage office building and its use is given by the two photographs reproduced at pp. 9-10. Curiously, neither the trial court nor the appellate court referred in any manner to any photographs. Nor does the language of the trial court's opinion (pp. A11-13) jibe with such "occular proof." Photograph 1 shows the Metro barricade on the Que Street side of the Anchorage office building as it existed on any day from July, 1970, to March, 1971, save for the crane. The Anchorage entrance is marked with an arrow. The eight-foot high barricade completely blocked off the Connecticut Avenue access to the Anchorage office building. The barricade ran along the length of Que Street, between Connecticut Avenue and 19th Street, N.W., starting at the corner wall of the Anchorage office building, where the barricade was affixed by large metal bolts and wooden braces, extended into approximately half the width of Que Street and ran east down Que Street almost to 19th Street. The only means of ingress and egress to the Anchorage office building during this period was a narrow, maze-like corridor of less than six feet in width from 19th Street, N.W., with several angular turns. Obviously, this mode of ingress and egress was inconvenient and unreasonably burdensome, to tenants, customers, delivery men, and visitors. It substantially, appreciably, and continuously interfered with the use of

the Anchorage as a commercial office building for rent. (J.A. 117-120, 141-142, 159-165, 167-168, 170, 190-196.)

The second photograph (1A) shows a dark and narrow overhang along two-thirds of the length of the Anchorage building from Connecticut Avenue. This was the covered walkway or tunnel, which Metro erected in March, 1971; it remained up through October, 1972. During this period it was possible to enter the Anchorage building from Connecticut Avenue through the tunnel. However, the tunnel remained an inconvenient, frightening mode of access, and it still blocked off completely the retail show windows of the Anchorage building's principal retail tenant (J.A. 165-67, 170). Incidentally, Photograph 1A shows no subway or other obstruction of the sidewalk south of Connecticut Avenue to Dupont Circle; nor was there any. Beginning in October 1972, the tunnel was removed and the entire Que Street front of the Anchorage office building towards Connecticut Avenue was again subjected to extended excavation and sidewalk repair which again prevented access from Connecticut Avenue until January, 1973.

Metro permitted its contractors, right along side the Anchorage, building, to produce loud and disturbing noises, to operate large motors, huge trucks, cranes, cement mixers, etc., emitting dust and smoke which deeply coated the windows and exterior walls of the Anchorage office building and permeated its interior. Explosives were set off at the rate of five to six per day over the years with resulting vibrations coming up through a hole immediately adjacent to the Anchorage office building—less than two feet away from Anchorage's exterior walls—shaking windows and frequently blowing them open, breaking windows, window frames and hardware, causing cracks in walls and ceilings, disturbing tenants and scaring visitors. (J.A. 146-152, 197-198.) Anchorage

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also sustained direct physical damages, through the drilling of holes in Anchorage's external walls, the breakage of windows and doors, cracks in interior walls and ceilings, malfunctioning of doors, including the subsidence of the storefront floor in the Walpole Bros., Inc., store, directly above the area where Metro caused its contractors to underpin the building (J.A. 153-155, 167-168).

The cumulative effect of the above was substantially to interfere with the retail and office tenants of the Anchorage building. Such interference led to tenant refusals to renew leases with consequent loss of rents. Over a two and one-half year period it was substantially impossible for Anchorage to rent office space to new tenants.

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EXHIBIT 1

Anchorage Office Building, 1555 Connecticut Avenue, N.W., showing barricade completely barring ingress and egress to Que Street entrance from Connecticut Avenue. This photograph shows the condition from August 1970, to March 1971.

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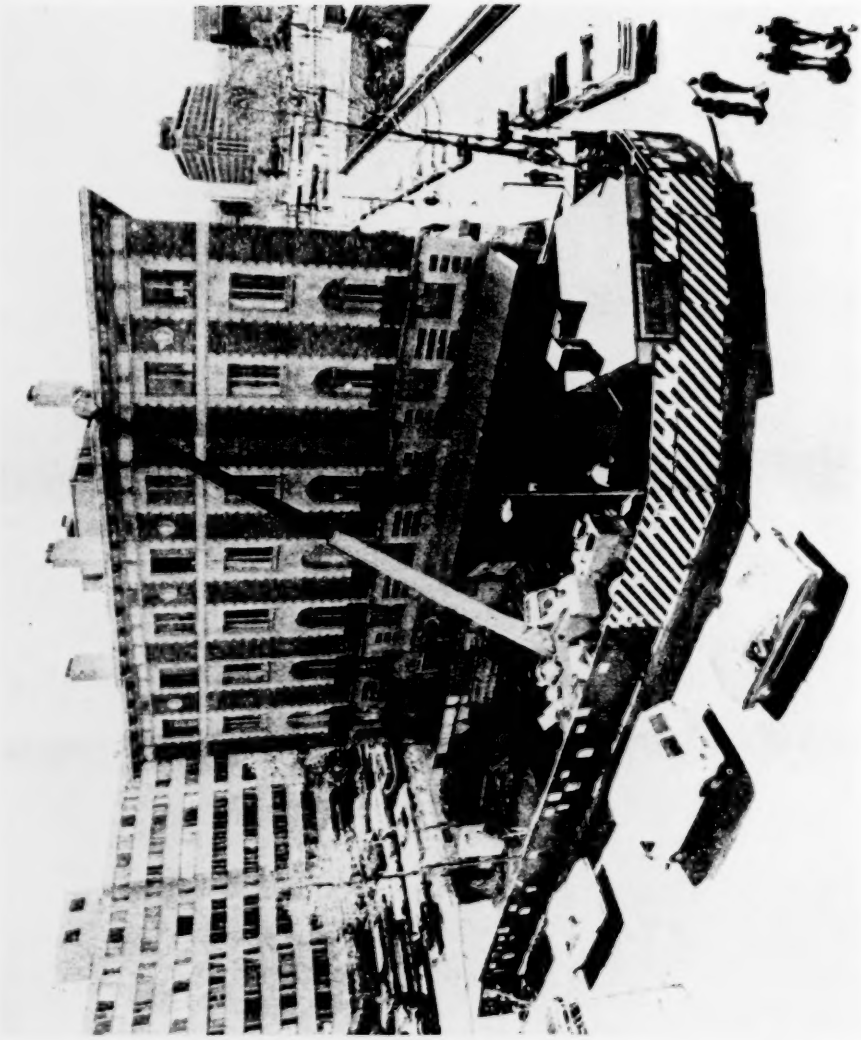

EXHIBIT IA

Anchorage Office Building, 1555 Connecticut Avenue, N.W., showing a covered walkway or tunnel from Connecticut Avenue to the Que Street entrance. This photograph shows the condition from March 1971, to October 1972.

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REASONS OF GRANTING THE WRIT

The trial court (pages A8-A-19), in a trial limited to liability, with evidence of damages excluded under pre-trial orders and by repeated cautions from the bench at trial, held (affirmed by the Court of Appeals in a one-page opinion p. 20):

(a) Anchorage had "failed to introduce evidence of the type of serious deprivation which is required in order to constitute a taking under the Fifth Amendment" (p. A-12);

(b) a taking under the Fifth Amendment arises only if the "deprivation which they [i.e., Anchorage] sustained was of such a permanent or complete nature as to require granting compensation to them" (pp. A-12-13);

(c) Anchorage had "consented to much of this interference" (A-13);

(d) Anchorage had failed to show "unreasonable and unnecessary delays in construction existed to form the basis for an award of damages" (pp. A-15-16);

(e) Anchorage had failed to show that it has "suffered any damage different from that sustained by the general public" (p. A-16);

(f) Anchorage had shown at most "incidental damages not necessitating the granting of compensation (p. A-16); and

(g) failing proof of either permanent or complete deprivation (under para. (b) above) or substantial, different or unreasonable damages (under paras. (a), (d), (e), and (f) above), Metro's interference with the Anchorage property for two and one-half years was merely "the price which people must pay for public improvements" (p. A-16).

The Court of Appeals found all these holdings to be harmless.

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The governing law in the District of Columbia on the impact of subway construction on private rights remains limited to the unpublished opinion of Judge Flannery in this case and a published F.R.D. opinion in a class action on the Dupont Circle underpass (for streetcars and motor vehicles) by Judge Holtzoff in 1956, in *Meyers* v. *District of Columbia*, 17 F.R.D. 216 (D.D.C. 1955), unillumined by any appellate decision or analysis for the guidance of the bar and bench and the citizenry of the Washington Metropolitan area. Does this record of decisional law satisfy Karl Llewellyn's tests[2] of judicial reasoning?

Anchorage's claims for damages are substantial, involving hundreds of thousands of dollars in this case alone, *infra*, p. 26. Nor did the subway's interference with Anchorage involve the mere passing inconvenience of a week, a month, or even a year; the interference stretched over two and one-half years; and aspects of subway interference are still continuing at the time of the submission of this petition.

At times counsel have worried whether this cause was decided, not by "articulated principles of law," constitutional or tort, but by that "brooding omnipresence in the sky," as Justice Holmes put it (at p. 222) in his dissenting opinion in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205

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[2] "The deciding is, in the main, done under felt pressure or even compulsion to follow up with a published 'opinion' which tells any interested person what the cause is and why the decision—under the authorities—is right, and perhaps why it is wise."

"This opinion is addressed also to the losing party and counsel in an effort to make them feel at least that they have had a fair break. * * *

"In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand." *The Common Law Tradition: Deciding Appeals* (1960), p. 26.

(1917). Can that brooding omnipresence be discerned in the concern over the subway, which, consciously or otherwise, oozes about the U.S. Courthouse at John Marshall Place and Constitution Avenue? The concern is that the building of the Washington subway—amidst interminable delays, rising costs and financing disenchantment—should not be handicapped by the judiciary imposing liability on the subway system for damages to private property, except in cases of condemnation. During the 1974 trial, the Courthouse itself was literally besieged by Metro construction, mostly on publicly owned land.

An example of "brooding omnipresence," with stress on "omnipresence," is the curiously ambiguous invocation of judicial notice by the trial court: "A large part of Connecticut Avenue was subject to Metro construction during this period, a fact of which the court takes judicial notice" (p. A-16). Is it a proper function of judicial notice to observe urban construction activities? "It is therefore plainly accepted that the judge is not to use from the bench, under the guise of judicial knowledge, that which he knows only as an individual observer outside of court." *9 Wigmore on Evidence* 540, § 2569. No precedent can be found in the cases cited by *Wigmore* for taking judicial notice of construction activities or any similar type of specific activity by contractors. See §§ 2596 through 2582 of *9 Wigmore on Evidence*. Even when judicial notice is properly invoked, its role is never conclusive, except, apparently, so far in this case.

The judicial notice of subway construction on Connecticut Avenue did not address itself to *the* critical question of this case, for the trial court said naught whether the subway construction, judicially noted, was pursuant to eminent domain. In fact, in all the subway construction on the western side of Connecticut Avenue

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at Dupont Circle, both to the north and to the south of the Circle, as well as on Connecticut Avenue at L and K Streets, there was compensation to property owners. None of these facts on eminent domain was on the record here. The only record is that the subway construction at Connecticut Avenue and Que Street, on the eastern side of Connecticut Avenue, where the Anchorage is situated, did not involve eminent domain and, therefore, no compensation to Anchorage. Hence, this law suit.

Public policy can be an unruly horse[3] in the deciding of disputes by courts. What kind of animal is unprecedented judicial notice for determining the outcome of trial without the parties remotely on notice of the role of judicial notice in the disposition of their cause until the opinion was issued giving decision against them?

Another example of "brooding omnipresence," with stress on "brooding," is the odd interplay between the two opinions of the trial court in 1973 and 1974 and the selective variations in the reasons and authorities cited. Analyzed in detail *infra*, pp. 31-33, the changing content of the trial court's legal authorities is suggestive of the strained reasoning process employed by the trial court in 1974 in ridding itself of its 1973 written law of the case. In a brutal phrase, Karl Llewellyn calls it a "sin against the nature of our case law" for a court "*deliberately* to turn the back upon a pertinent but uncomfortable authority, leaving it unmentioned and therefore leaving the question open as to how the matter now really stands . . ." *The Common Law Tradition*, p. 256. In consequence, the court jeopardizes not merely its "credit for candor, it is its credit for fairness" that is called into question. *Ibid*, p. 258. It is submitted that these broadside shifts of the trial court's authorities defy

[3] Cf. de Katzenbach, "Conflicts on an Unruly Horse," 65 Yale L. J. 1087 (1956).

understanding in terms of "articulated principles of law." The explanation lies elsewhere.

If Justice Holmes' mighty line lends justification to the above, there indeed arises *a genuine constitutional crisis: the courts, in subway cases in the Washington metropolitan area, have abdicated their power* under Article III of the Constitution to decide disputes under the Fifth Amendment for just compensation. The abdication, in effect, endows Metro as the current constitutional successor of the courts, for Metro has been vested with the power of final decision in its own cause. If Metro chooses to label a particular construction site as condemnation, Metro pays the property owner for the taking; if Metro decides not to use the condemnation process, Metro avoids paying the property owner who himself pays—as his unapportioned contribution to the "price which people must pay for public improvements," in the words of the trial court.

Can this be constitutionally permissible?

I. The denial of Metro's liability for construction interference with the use of the Anchorage Office Building for two and one-half years on the ground that such interference is "the price which people must pay for public improvements," as the trial court held, violated Anchorage's constitutional rights to just compensation under the Fifth Amendment, which, as this Court has repeatedly said, was designed to bar government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole.

The ruling of the trial court that the subway's interference with the Anchorage over a two and one-half year period was "the price that people must pay for public improvements" (p. A-16) many sound innocuous as a generality. In form, a generality—"people"—, the trial

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court's application was specific. By "people" the trial court meant Anchorage and nobody else. The trial court did not mean neighboring property owners on the east side of Connecticut Avenue, between Dupont Circle and Que Street, who did not at any time in the years 1970 to 1973, have barricades placed in front of their buildings,[4] as is clearly visible from Photograph 1A, at p. 10. Nor did the trial court mean by "people" the taxpayers. If that were the meaning, the trial court would have then found liability for Anchorage against Metro. Under the ruling of the trial court, unless reversed, Metro may interfere with the use of private property with impunity, as long as the interference is either temporary, that is, non-permanent, or, in the alternative, is incomplete.

The trial court's ruling is clearly not the law of the United States under the Constitution, for a taking of property does not depend, under the decisions of this Court, upon either completeness[5] or permanence of the taking. Thus the result below is in conflict with *Armstrong* v. *United States*, 364 U.S. 40 (1960), where this

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[4] True, there were barricades on the west side of Connecticut Avenue in front of buildings acquired, wholly or in part, by Metro under condemnation, and therefore owned or used by Metro.

[5] This is also true in tort law: Thus, Professor Prosser in "Private Action for Public Nuisance," 52 Va. L. REV. 997 (1966), wrote (at p. 1020): "But the deprivation need not be complete. Access from the north may still be a property right of value although ingress and egress is still open to the south, and the fact that the plaintiff can still enter in front from the street does not prevent his recovery [p. 1021] when the obstruction of an alley deprives him of entry from the rear. The fact that another way is still open, and that it is even a more convenient one, does not mean that there is no particular damage when a useful and valuable entrance is closed off. Furthermore, the interference itself need not be complete. The right is one of reasonably convenient ingress and regress; and whenever its exercise is made unreasonably burdensome or inconvenient, or unsafe, the particular damage is shown." Also see note 8, *infra*, p. 20.

Court said (at p. 49): "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"; *Nashville, C. St. L. Railway* v. *Walters*, 294 U.S. 405 (1935), where this Court, speaking through Justice Brandeis, said (at p. 429): "But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured"; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 80 U.S. 165 (1872), where this Court held (at p. 179): "But there are numerous authorities to sustain the doctrine that a serious interruption of the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken"; and *Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (1914), involving a railroad tunnel in the District of Columbia, constructed under an Act of Congress, where this Court concluded (at p. 557): "Construing the acts of Congress in the light of the Fifth Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without just compensation to him." [6]

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[6] Illuminating precedents from the litigation over the elevated railway in New York City were summarized by Justice Cordozo, in *Roberts* v. *New York*, 295 U.S. 264 (1935), at pp. 278-282, as follows:

> ". . . appurtenant to plots abutting on a highway are certain private easements—easements of light and air and access—which may not be destroyed or impaired through the construction under legislative sanction of an elevated railroad without payment to the plot owners of the damage to their land and buildings. Many later cases enforced the same doctrine and enlarged its scope applying to the lots where the fee of the highway was vested in the city." [Citing New York Cases].

In *United States* v. *Dickinson*, 331 U.S. 745 (1947), Justice Frankfurter, speaking for a unanimous Court, upheld the award of damages for intermittent flooding of land caused by a dam construction by the United States Government (at pp. 748-749):

> "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die. * * * All that we are holding is that when the government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or preventive litigation to ascertain the just compensation for what is really 'taken.'"

Not every interference, or even destruction, of property results in a taking for which compensation is required under the Fifth Amendment. For example, destruction of oil facilities in time of war to deprive the enemy of the United States from enjoying their energy was found by this Court to present no case for compensation. *United States* v. *Caltex, Inc.*, 344 U.S. 149 (1952). Nor did the wartime suspension of the operations of non-essential gold mines for the duration, without governmental possession, use or forced sale of the mine, require compensation. *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1955). But these were times of great peril and war, and are usually justified on grounds of necessity.[7]

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[7] Also see *Y.M.C.A.* v. *United States*, 395 U.S. 85 (1969), involving a claim for damages to Y.M.C.A. buildings in the Canal Zone resulting from rioting mobs, during which time the building was occupied by troops for the purpose of protecting the building. The Court of Claims denied the claim for damages done by rioters after the troops left the building. This Court affirmed, saying (at p. 92):

> "But, where, as here, the private party is the particular intended beneficiary of the governmental activity, 'fairness and

Tort law would permit an affirmative resolution of the Anchorage claim without reaching the constitutional issue. The *Restatement of the Law: Torts, II*, by the American Law Institute (Tentative Draft No. 17, 1971) deals with public and private nuisances affecting land and in particular as such nuisances abridge rights of *access to land*, as follows (p. 16):

> *f. Access to land.* The right of access to land, which is to say the right of reasonable and convenient ingress and egress, is itself a property right in the land. Where the public nuisance interferes with immediate ingress and egress to the plaintiff's land, the nuisance is a private as well as a public one, and the harm suffered by the plaintiff is particular harm differing in kind from that suffered by the general public, so that the plaintiff can recover for the public nuisance. Complete deprivation of access, when the land of the plaintiff is completely cut off, is obviously sufficient particular damage. But the deprivation need not be complete, and it is enough that the ingress or egress is made unreasonably burdensome or inconvenient, or unsafe. Access by a particular entry is still a valuable property right even though there may be another entry left open; and the fact that there is access from the

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justice' do not require the losses 'be borne by the public as a whole', even though the activity may also be intended incidently to benefit the public."

Here Anchorage was no "particular intended beneficiary" of the subway construction, although like all other property owners in the Washington metropolitan area it would ultimately benefit from the subway system.

General benefits do not deprive an owner of property from making either a constitutional claim for taking or from pressing a claim for public or private nuisance. Benefits common to the community, while at the same time causing special harm to the plaintiff, are not offset against the plaintiff's claim for damages. See *Restatement, II, Torts*, § 920, *Comment c*, T.D. No. 19, (1973) at pp. 162-63.

north left open does not prevent the recovery when the plaintiff is deprived of access from the south.[8]

Illustrations:

4. A digs a trench across the public street, which not only prevents travel on the street, but also blocks the entrance to B's private driveway, so that B cannot get his car out of his garage. B can recover for the public nuisance.

5. The same facts as in Illustration 4, except that the entry into the driveway is not completely blocked, but is made extremely difficult, inconvenient, or dangerous. The same conclusion.

6. The same facts as in Illustration 4, except there is another entry to the driveway left open through an alley in the rear of B's premises. The same conclusion.

By barring for two and one-half years the principal ingress and egress to the Anchorage office building from Connecticut Avenue, Metro substantially interfered with Anchorage's property rights[9] to enjoy normal access.

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[8] See also Prosser, *Handbook of the Law of Torts*, (4th ed., 1971) at p. 589:

> "Where immediate ingress and egress are completely cut off, there is no doubt there is particular damage, for which the private action will lie. But there need not be complete deprivation, and it is enough that one entrance is closed, although there is another available [citing cases], or that the obstruction makes use of the passage unreasonably burdensome or inconvenient [citing cases] or unsafe [citing cases]. It is only when the obstruction is so minor or partial that it is not regarded as a substantial interference with access [citing cases] that the remedy is denied."

This passage falls within § 88 of Prosser's *Handbook*, which was the section cited by the trial court in its opinion of 14 June, 1973. That section was omitted, and the omission must have been deliberate, in the trial court's opinion in 1974, *infra*, p. 32.

[9] Since *Brownlow* v. *O'Donoghue Brothers, Inc.*, 51 App. D.C. 144, 276 F 636 (19), it has been settled law in the District of

Applying the *Restatement II: Torts*, Comment and illustrations to this case, it is only necessary to change the points of the compass of north and south (as given in the Comment) to east and west (as in this case), and to substitute "19th Street" (as in this case) for alley (as in the illustration). The *Restatement II: Torts* is truly authority on all fours.

In its second opinion in 1974, the trial court ignored the *Restatement II: Torts*. So did the Court of Appeals in 1975. That, of course, is the silent way of avoiding pertinent but uncomfortable authorities, *supra*, p. 14, and *infra*, p. 33.

Columbia that a property owner abutting on a public street has, as the court there declared, a "right of access to and from [14th] street [is] a property right, which, though subject to legitimate regulation, cannot be taken from it without just compensation." This case is cited in *3 Nichols on Eminent Domain* 377, at note 922, as showing that the District of Columbia recognizes the common-law doctrine of abutter's easements.

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II. The constitutional right to a fair trial over the taking of property was denied when Anchorage found itself entrapped by the cumulative impact of a series of trial rulings from fully presenting its claim for just compensation. Thus,

(1) after initially, on 14 June, 1973, sustaining the sufficiency of the complaint in a detailed written order, the trial court ordered a bifurcated trial between liability and damages;

(2) the trial court suspended discovery on damages (including special damages) and repeatedly ordered Anchorage not to present evidence of damages (including special damages); and

(3) notwithstanding, the trial court found Anchorage had failed, at trial, to produce sufficient evidence of serious deprivation or substantial or special damages.

Anchorage entered upon the trial in September, 1974, in a complacent frame of mind. It had successfully weathered Metro's first motion to dismiss (filed December, 1972), which had been pending for six months, allowing ample time for full deliberation by the trial court before issuing its ruling on 14 June, 1973. Not only was Metro's motion to dismiss denied, but Anchorage was comforted by the trial court's four-page opinion, which adopted Anchorage's causes of action as sufficient and specifically delineated them by reference to numbered paragraphs of the complaint (p. A-1).

During the intervening year between the 14 June, 1973, order and the trial in September, 1974, Anchorage submitted to a series of procedural rulings by the trial court and the pre-trial magistrates as follows:

Firstly, the trial court ordered, *sua sponte*, on 18 September, 1973, that "the issue of liability be bifurcated from the issue of damages and be separately tried in advance of the trial on the issue of damages" (p. A-5).

Secondly, continued discovery on Anchorage's damages was forbidden by the trial court.

Thirdly, the pre-trial magistrate, specifically excluded "special damages", as well as damages in general from the first trial, p. A-6.

Fourthly, the trial court cautioned Anchorage at trial repeatedly (a) "let's stay away from damages" (J.A. 115); and (b) do not present evidence "as to the effect of this construction on the business of running and leasing a property" (J.A. 115).

Lastly, the trial court assured counsel for Anchorage, as a consequence of counsel's obeying the trial court's directions not to present evidence of damages, that Anchorage would not be criticized "for not spelling out in detail the elements of liability" (J.A. 115).

At trial Anchorage relied on the recognition of its causes of action in the trial court's opinion of 14 June, 1973, which held that Anchorage's allegations in complaint paragraphs 10-15 contained "sufficient facts to support a cause of action for interference with their rights of easement for access, light, and air" and that complaint paragraphs 16-20 were sufficient "for public and private nuisance." [10]

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[10] Excerpts from the complaint (J.A. 1-7):

> (11) Defendants Metro and Healy have erected, maintained and are continuing to maintain an 8-foot high barricade along the entire length of the south side of Que Street, between Connecticut Avenue and 19th Street, N.W., running from the external corner walls of the Anchorage at the south-east intersection of Connecticut Avenue and Que Street, N.W., to the south side of the Que Street curb and extending into approximately half of the width of Que Street and running along east on Que Street to 19th Street, N.W.
>
> (12) During the period from July 1, 1970, and extending to March 1, 1971, the aforesaid defendants completely barricaded the principal ingress and egress of the Anchorage, namely

from Connecticut Avenue, the principal direction of the building's traffic flow (para. 8).

(13) During the aforesaid period from July 1, 1970 to March 1, 1971, the only means of ingress and egress to the Anchorage left by the aforesaid defendants was a narrow and dark corridor of less than 6 feet in width from 19th Street, N.W. This mode of ingress and egress was inconvenient, unreasonably burdensome and dangerous to plaintiffs, their tenants, customers and visitors, thereby substantially, appreciably and continuously interfering with the use of and benefits from the Anchorage by plaintiffs, including their easements of access, light and air.

(14) On March 1, 1971, defendants Metro and Healy opened a wooden walkway or tunnel, of a width of 4 feet and a height of 8 feet, running from the principal entrance of the Anchorage on Que Street to Connecticut Avenue. While this tunnel was less of an interference with plaintiffs' rights than a complete bar to their Connecticut Avenue access, as set forth in paras. (11) and (12), nonetheless, it was and remains inconvenient, somewhat frightening in appearance, especially to women, conducive to crime, and dangerous during blasting operations of the aforesaid defendants, and still blocks off completely the retail show windows as alleged in para. (15) below.

(15) During the period from July 1, 1970, to date, the barricade (para. (11)) has completely covered, and still completely covers, the Que Street show windows of plaintiffs' larger retail tenant, Walpole Bros., Inc., and has substantially interfered, and still substantially interferes, with the show windows of the other and smaller retail tenant of plaintiffs known as the African Shop, both with damaging consequences to plaintiffs as specified in paras. (21), (22) and (23) below.

(16) Throughout and continuing to this day the aforesaid defendants have produced loud and disturbing noises; they have conducted continuous and intermittent operations of large motors and huge trucks, cranes, cement mixers, and other noisy operations; they have emitted dust and smoke which has deeply coated the windows and the exterior of the Anchorage and permeated the interior as well; they have set off explosions at the rate of 5 to 6 per day over a two-year period, with resulting vibrations through a hole immediately adjacent (5 feet) to the Anchorage, shaking windows and frequently blowing them open, breaking window frames and hardware, causing cracks in the walls and ceilings, disturbing tenants and scaring visitors who are fearful that another bomb has gone off in Washington.

[Footnote continued on page 25]

At trial, Anchorage introduced evidence to support the allegations in paragraphs 11 to 20 of the complaint, as specified by the trial court's order of 14 June, 1973, except for paragraphs 19 and 20. These paragraphs dealt with damages, aggravation of damages, and special damages, and were thus excluded from the liability phase of trial under the bifurcation and pre-trial orders.

The gravamen of Anchorage's claim against Metro was for interference by subway construction with the use of the Anchorage Office Building on such a physical scale (see photographs, pp. 9-10), extending over such a prolonged period of time, and with such harmful effects upon financial operations that there arose a claim for compensation. Anchorage's case at trial established the dimensions and duration of the subway's interference, by photographs and testimony. The impact of the sub-

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[10] [Continued]

(17) The continuing acts by defendants Metro and Healy make it extremely difficult for deliveries to be made by trucks and for persons getting out of automobiles and taxi-cabs to reach the Anchorage, since the only means of ingress and egress to and from vehicular traffic has been from 19th Street since July 1, 1970.

(18) The aforesaid defendants frequently use the little remaining open streets and sidewalks abutting on the Anchorage for continuous storing of trucks and passenger cars, with no hindrance from the police, further rendering difficult deliveries as alleged in para. (17).

(19) Through their own negligence, the aforesaid defendants have unnecessarily delayed and unreasonably prolonged the completion of the specific subway construction, thereby specifically contributing to and aggravating defendant's interferences with plaintiffs rights and to their damage.

(20) In addition to the physical damage to the Anchorage, the harm sustained by plaintiffs includes the markedly reduced ability of plaintiffs to rent premises where leases expired during the long period of the aforesaid defendants' unreasonable interference with plaintiffs' use and enjoyment of their land and building, resulting in prolonged vacancies in the Anchorage aggregating an annual loss of $20,000.

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way interference upon the operations of Anchorage as an office building was also shown in terms of such physical facts as the barricade, the repeated explosions and the prolonged interferences with access.

However, the trial did not deal with the most impressive proof of the serious and substantial deprivation suffered by Anchorage, for this proof lay in the area of finance and was hence excluded from presentation at trial on the ground that such evidence smacked of damages. At trial the court was constantly alert to keep such proof out. Before the court's suspension of discovery on damages, evidence had already been disclosed to Metro as part of discovery to show the catastrophic fall in Anchorage's gross rentals during the period 1970-1973 —when the subway construction was underway—in contrast with the rentals received by Anchorage in the prior years 1967-1969 and in the period after the cessation of subway construction in 1973.[11] This great decline in rental income reflected the inability of Anchorage, in a period of rising costs of operating an office building, to renew leases for existing tenants or to secure new tenants as leases ran out. Anchorage was forced to secure

[11] In response to Metro's request for the production of documents under Rule 34, Anchorage submitted the following rental figures as taken from its Federal partnership income tax informational returns:

Year	Gross Rentals
1964 (under remodelling)	$ 9,050.00
1965 (partially under remodelling)	39,820.00
1966	61,698.60
1967	63,114.46
1968	67,045.25
1969	69,044.26
1970	51,740.00
1971	51,486.88
1972	55,655.00
January through June, 1973	29,353.72

[Rentals in 1974 and 1975 rose to $68,014 and $74,113 respectively.]

forebearance from its principal creditor, the Equitable Assurance Society of America. All of this had been enumerated in the complaint as component elements of damage.[12]

In the light of the hindsight provided by the final opinion of the trial court, Anchorage recognized that it had been confronted with an impossible procedural dilemma. The dimensions only became clear after the trial court unexpectedly discarded its own law of the case. By then, Anchorage was already entrapped[13] from the

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[12] For rental loss see paragraph 20 of the complaint, reproduced *supra*, p. 25, at note 10. The complaint further specified the following damages:

> (21) Defendants' acts have forced plaintiffs to reduce the rental rates for the east retail store, known as the African Shop, downwards by 50%, aggregating an annual loss of $3,500.
>
> (22) Defendants' acts have forced plaintiffs to renew the lease to the west retail store, to Walpole Bros., Inc., at the same rate as the lease executed in 1964, notwithstanding the marked increase of rental rates that have occured for commercial retail space on Connecticut Avenue between 1964 and 1971, aggregating an annual loss of $6,000.
>
> (23) Defendants' acts have reduced the volume of sales of Walpole's, thereby eliminating completely the percentage rent owing to plaintiffs, in an annual loss of $4,000 in 1970, and 1971.
>
> (24) Defendants' acts have forced plaintiffs to reduce the rentals of office space from rates previously obtaining, aggregating an annual loss of $15,000.
>
> (25) Defendants' acts have forced plaintiffs to obtain from the Equitable Assurance Society of New York, which holds the first trust on the property, a moratorium on principal amortization during the period of defendants' interference with plaintiffs' use and enjoyment of the land and building, at an increased interest cost of $22,000, and legal expenses of $765, amounting in total to $22,765.

[13] The word "entrapped" is used here in the sense in which it is sometimes employed in the law of testimonial evidence where a witness called by a party may be impeached when he changes his story from that previously submitted in affidavit or other testimonial form. See *Words and Phrases*, "Entrapment." In this

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presentation of its full case for a constitutional claim for a taking arising from subway construction at its front door for two and one-half years. Perhaps Anchorage should have opposed the bifurcation order issued by the trial court *sua sponte*, in September, 1973. Anchorage did not do so because it took the order on its face as a good-faith instruction of the trial court to conduct the case in two trial phases in the interest of expedition.

III. The trial court denied justice to Anchorage by discarding the law of the case as laid down by the trial court itself in its order of 14 June, 1973, which delineated therein, in detail, the causes of action, on which Anchorage had a right to rely at trial, and did so rely; and the trial court justified its judgment by reasons and authorities so wholly and deliberately at variance with the law of the case, as formulated by the trial court itself in its 1973 order, as to suggest the applicability of Llewellyn's charge of a "sin against the nature of our case law."

An alternative way to the constitutional framework of analyzing the fair-trial problem is to examine the record of the trial court in terms of the doctrine of the law of the case.[14] This doctrine was directly flaunted in the following respects:

In its final judgment, the trial court found Anchorage at fault for failing to show deprivation of a permanent and complete nature in order to sustain a cause of

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sense, Anchorage found itself, in effect, entrapped when the law of the case was changed unexpectedly in the trial court's 1974 opinion after the closing of proof. The word "entrapped" is not used in the sense of the criminal law for an offense committed by law enforcement officers.

[14] This doctrine has ancient parallels, e.g., *Lex Cornelia* of the Roman Republic (67 B.C.) which "ordained that for the future it should be an offense for magistrates to administer justice otherwise than in accordance with the rules they had published on entering office." *IX Cambridge Ancient History* 343.

action for interference with easements of access, light and air, pp. A-12-13. Yet no such requirement was contained in the trial court's 14 June, 1973 order, which ruled that paragraphs 10 to 15 of the complaint stated a cause of action for interference with easements of access, light and air. Nowhere in paragraphs 10 to 15 does there appear any allegation that the interference must be "permanent" or "complete" deprivation; on the contrary, the allegations of the complaint on its face shows the interference to be of a temporary, if prolonged, nature.

Further, the final judgment of the trial court ruled that in a cause of action for public and private nuisance, Anchorage was required to show "damage different from that suffered by the general public," (p. A-16). Again, this requirement is contrary to the trial court's prior ruling that Anchorage's complaint stated a cause of action for *private* as well as public nuisance.[15] At no place in paragraphs 10 through 20 of the complaint does there appear any allegation of special or different damage. The allegation of special, distinct and different harm appears only in paragraph 26 of the complaint,[16]

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[15] In a nuisance case a plaintiff must allege and prove special and distinct harm if he is attempting to abate a public nuisance; such is not required in the case of a private nuisance. Prosser, *Private Action for Public Nuisance*, 52 Va.L.Rev. 997 (1966). However, even in the case of public nuisance, Prosser states that where the allegations involve interference with rights in land, special and distinct harm is always present and that a private action will clearly lie (as p. 1018). Also see Prosser, *Handbook, op. cit.*, p. 589, quoted in note 8, *supra*, p. 20.

[16] The allegations of para. 26 of the complaint read as follows:

> (26) The harm suffered by plaintiffs is special to them, distinct and different from that sustained by any other land owners in the immediate vicinity of Connecticut and Q, inasmuch as no other building in this vicinity has had its principal ingress and egress completely blocked off for a lengthy period of time by defendants and no other land owner in this vicinity has sustained the constant noises, and vibrations caused by

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wholly outside any of the enumerated elements of the causes of action approved by the trial court in its 14 June, 1973, order. That order is bereft of any requirement that Anchorage show special or particular harm or damage as an element of liability. In fact, neither the word "harm" nor "damage" is used in the entire text of the 14 June, 1973 order. Relying thereon, Anchorage presented no evidence in support of special, distinct, and different harm other than the admission by Metro's counsel in his sworn answer to interrogatories on this question.[17] The trial court refused to admit into evidence Metro's answer to this interrogatory on that ground that it had not been specifically listed in the pretrial order. Anchorage contended that an answer by Metro by its counsel to an interrogatory was either an admission by a party or a stipulation by counsel and was thus binding on Metro at trial.[18]

The judgment of the trial court faulted Anchorage for failing to show unreasonable delays in the completion in construction (p. A-13). The only place in paragraphs 10 through 15 or paragraphs 16 through 20

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hundreds of explosions under Connecticut Avenue, vented outward and upwards in the immediate proximity to plaintiff's building.

[17] Anchorage Interrogatory 13:

"State whether the construction activities of Metro and its contractors, considering the normal flow of pedestrian traffic prior to such construction, have completely barred from the middle of the street to the building entrance the principal ingress and egress of a commercial building? If so, give particulars of places and duration, including photographs or drawings." (J.A. 21)

Metro's response was "No." (J.A. 23)

[18] An answer to an interrogatory reciting material fact may constitute an admission. *Champlin* v. *Oklahoma Furniture Mfg. Co.*, 269 F.2d 918, 920 (10th Cir. 1959), at 920. Moreover, an answer made under oath by counsel for the party has the effect of a stipulation. *Laird* v. *Air Carrier Engine Service*, 263 F.2d 948 (5th Cir. 1959).

of the complaint that an allegation of unreasonable delay appears is in paragraph 19, as an "aggravation of damages." Obviously, aggravation of damages was not an essential element of liability, as distinct from damages, and, therefore, was not suitably in evidence in the liability phase in a bifurcated trial.

The trial court achieved the turn-about of the law of the case, without notice and after the closing of Anchorage's proof, by assigning reasons and authorities for its judgment wholly at variance with the reasons and authorities cited in its 14 June, 1973 order—in fact the 1974 judgment shares only a one-sentence citation in common with the authorities cited in the 1973 order. The 14 June, 1973 order by Judge Flannery relied on Prosser, *Handbook on the Law of Torts*, § 88 (4th ed. 1971); Powell, *The Law of Real Property*, §§ 410, 413, 420; Restatement of the Law: Property, § 450; *District of Columbia* v. *Totten*, 5 F. 2d 374, cert. den. 269 U.S. 562 (1925); and *Marzo* v. *Seven Corners Realty, Inc.*, 171 F. 2d 144 (D.C.C. 1948), aside from cases on sovereign immunity and summary judgment. The final judgment by Judge Flannery in 1974 relied on *Meyers* v. *District of Columbia*, 17 F.R.D. 216 (D.D.C. 1955); Nichols' *Law of Eminent Domain; Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (1914); *Baltimore & Potomac RR Co.*, v. *Fifth Baptist Church*, 108 U.S. 317 (1883); Prosser, *Handbook on the Law of Torts*, (4th ed. 1971) 587 and 606-607.

The one sentence from the trial court's 1973 citation to Prosser's *Handbook on the Law of Torts* that survived in its 1974 judgment reads: "There is general agreement on the requirement that the plaintiff's damage be different in kind, rather than in degree from that shared by the general public" (p. 587). But the 1974 judgment by the trial court did not mention that on the next page (p. 588) Prosser makes clear that the above

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general statement is really inapplicable (i.e., *ipso facto*) to public nuisances involving *rights in land*, which is the precise subject matter of the Anchorage suit:

> "*Deprivation of immediate access to land*, which *is quite clearly a special kind of damage*, shades off by imperceptible stages into the remote obstruction of a highway, which is just as clearly not (p. 588) (emphasis added).

This passage contained a connecting footnote reference by Prosser to the following:

> "But where other routes are open, and it is only one that is blocked, the line must somewhere be drawn between deprivation of access to land, which is a property right, and mere deprivation of the public right of passage, which is not. This is essentially a matter of degree. In general, *when the obstruction is close to the land, as for example two hundred feet away in the same block, so that the plaintiff must detour to travel in one direction, it has been treated as interference with access*, while more remote obstruction, permitting the plaintiff to make a substantial start on his journey before he is forced to detour, has been regarded as nothing more than interference with the public right to travel" (emphasis added) (pp. 590-91).

Clearly these omissions from the Prosser *Handbook* in the trial court's 1974 opinion were pertinent, if uncomfortable, to the 1974 argument of the trial court. They must have been deliberate. By citing pp. 587 and 606-607 of the Prosser *Handbook* the trial court can be obviously taxed with knowledge of the intervening pages of 588 and 590-91. Certainly counsel would be held to this standard of responsible scholarship. The omissions from the Prosser *Handbook* were crucial to the decision in this case, for they fit precisely Metro's obstruction of the Anchorage property—not at 200 feet,

but right against the Anchorage walls!—to a degree that Prosser could be cited, and was here cited,[19] as an authority "on all fours" in support of Anchorage's claim in tort law.

The second citation to Prosser in the trial court's 1974 judgment is to pp. 606-607 of his *Handbook*, dealing with legislative authorization as a defense to the tort of public nuisance. The trial court implied that Metro had a defense in terms of the general Congressional authorization for the subway system. If this were the law, the trial court sponsored a back-door revival of sovereign immunity,[20] which the trial court had, presumably, decisively laid at rest in its 1973 order. Nor did the trial court state explicitly that it was formally receding from its 1973 ruling on sovereign immunity. However, the trial court achieved the same results as a reversal on immunity. That may be one of the vices of "brooding omnipresence" in supplanting "articulated principles of law."

The above treatment by the trial court of "pertinent but uncomfortable authorit[ies]" suggests that the 1974 trial court judgment qualifies as a classic case of Llewellyn's "sin against the nature of our case law," *supra*, p. 14.

The result was another instance of the denial of justice to Anchorage by the courts below.

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[19] Much of Professor Prosser's language can be found in *Restatement II: Torts*, as quoted *supra*, pp. 19-20. Professor Prosser served as the Chief Reporter for *Restatement II: Torts* through the spring of 1970.

[20] At trial Metro made no argument of sovereign immunity. Inexplicably, the sovereign immunity argument was revived by Metro at the appellate stage in its brief, as well as in oral argument.

IV. The trial court's conclusion that Anchorage had consented to much of Metro's interference with the use of its office building is predicated upon two conjoint errors:

(1) a contrived interpretation of a letter carefully drawn by Anchorage under Article 22 of the D.C. Building Code, which related to underpinning by Metro's contractors, and nothing more (as specifically disavowed in a contemporaneous letter by Metro's counsel); and

(2) an inherently incredible finding of fact of the "90-day wonder" performance by Metro's contractors, specifically at variance with the written admission by Metro's counsel at pre-trial that access was denied for 180 days. Neither error proved harmless, for their conjunction lent a color of plausibility to the trial court's rejection of Anchorage's claim as unfounded in law and fact.

This reason for granting the writ of certiorari is admittedly in a different category from the preceding and is essentially anticipatory and defensive. Anchorage does not contend that this fourth reason is sufficient for this Court to grant a writ of certiorari, for errors of law and fact fall within the area of private law which, under Rule 19, can only with difficulty be made into an argument for granting certiorari.[21] Anchorage, however, does contend that the following arguments effectively dispose of any contention that Anchorage had consented to a substantial part of the subway's interference and, consequently, that "consent" cannot be invoked as a ground for denying a writ for certiorari.

(a) *"Consent" attributed to Anchorage.* In its final

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[21] See *Purnell* v. *Southall Realty Co.*, 416 U.S. 363 (1974), where (at p. 366) it was said, "This Court has long expressed its reluctance to review decisions of the courts of the District of Columbia involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide appeal."

opinion, the trial court stated that Anchorage "consented to much of this interference," (p. A-13), and cited a letter exchanged between the parties dated July 7, 1970, amended July 17. This conclusion of the trial court does violence to the very text of the Metro-Anchorage agreement, for by its opening terms this letter agreement was limited to underpinning in accordance with Article 22 of the D.C. Building Code, quoted, *supra*, at p. 4. The letter specifically permitted Metro contractors to enter the Anchorage office building for the purpose of underpinning that building in the course of excavation. That function, underpinning, under the D.C. Code, alone was authorized. Without such consent, Metro's underpinning would be a trespass. The letter obviously did not cover Metro's construction activities in public space, over which Anchorage had no control.

Anchorage's letter merely spoke of the fact that Anchorage recognized the physical fact that, for a limited period of 105 days, it would be unsafe to provide a walkway from Connecticut Avenue. The most that Anchorage waived was the right to enjoin Metro during that period.[22]

By its terms, the agreement had obviously nothing to do with damages. This was made abundantly clear by the supplemental letter of 20 July 1970, from counsel for Metro (Mr. Brill) to Anchorage, expressly disavowing that the letter agreement constituted a blanket release or waiver of damages by Anchorage (J.A. 225).

The ruling of the trial court that consent to underpinning, a highly technical activity, applied to the inter-

[22] The same argument of the alleged waiver or consent by Anchorage to Metro's interference with Anchorage's easements was made by Metro's counsel in its first motion to dismiss in December, 1972, and the same answer in substance was made by Anchorage as above. The ruling of the trial court on 14 June, 1973, made no allusion to any alleged waiver. Under the doctrine of the law of the case, the waiver argument was, therefore, foreclosed.

ference by Metro with Anchorage's easements, is so contrary to the very terms of the letter agreement that the trial court's interpretation sticks out as one contrived to support the court's preferences for freeing Metro of liability. The process whereby the trial court underpinned its consent argument raises another serious question of judicial fairness as well as candor.

(b) *The "90-day wonder" of the trial court.* It is inherently incredible that anything connected with the Washington subway could be on schedule. It is even more incredible that anything about the subway could be ahead of schedule, except the running out of money. The trial court's finding of "90 days" is pivoted on its own statement (p. A-11) that "During the underpinning activity, a period of approximately 90 days, there was no direct access" to the Anchorage from Connecticut Avenue. The trial court confused the completion of the underpinning process with the removal of the subway barricade in front of the Anchorage. Anchorage's complaint was to the barricades, not to the underpinning of its building, and in fact Anchorage consented specifically thereto. The trial court's finding of 90 days is an egregious error contradicted by the precise written concession of fact by Metro's counsel in its pre-trial statement [23] which is printed in and incorporated in the pre-trial order. There counsel for Metro said: "access to the Anchorage Office Building entrance was . . . not available from Connecticut Avenue . . . for a period of 180 days, from July 31, 1970, when the fence was in-

[23] Following the oral granting of Metro's motion to dismiss, the trial court requested counsel for Metro to prepare proposed findings of fact and conclusions of law. This Metro's counsel did in terms of the "90 day" finding as set forth above. Counsel for Anchorage has been unable to understand, *ethically*, the continued silence of Metro's counsel on the critical discrepancy between its written admission at pre-trial in terms of 180 days, as quoted in the text above, and its submission of proposed findings for the trial court in terms of 90 days.

stalled for the underpinning activities, until the pedestrian walkway was completed and opened in February 1, 1971" (J.A. 104).

The argument of the trial court that Anchorage, having consented to a complete barring of access to the Anchorage from Connecticut Avenue for 105 days, could not be heard to complain of the lesser period of 90 days, thus collapses. The trial court also ignored the fact that for a period of several months in late 1972 and early 1973 access from Connecticut Avenue was also barred by Metro construction. The complete barring by Metro of Connecticut Avenue access to the Anchorage was in excess of the time claimed in Anchorage's complaint, which had been sustained by the trial court on 14 June, 1973, as the law of the case.

The trial court also erred in refusing to find absolute liability of Metro under Article 22 of the D. C. Building Code and in requiring Anchorage to show that Metro "caused the alleged damage and have thus failed to sustain their burden of proving causation" (p. A-17). Aside from the relevancy of a trial court determination of damages in a trial restricted to liability, the D. C. Building Code imposed absolute liability on an excavator in relation to an adjacent building, and such liability is imposed solely on the basis of *post hoc, propter hoc.* Where a person excavates his own land, or in this case on public land under authorization of the District of Columbia Government, and is proceeding pursuant to the D. C. Building Code, beyond a depth prescribed in such building code in relation to adjacent or adjoining structures or improvements, such structures and improvements must be protected at the expense of the excavator.[24]

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[24] "The requirement is *absolute* and cannot be delegated, and *reasonable care alone is not sufficient*" (emphasis supplied), 2C JS, Adjoining Landowners, § 22, at notes 95 and 96, at p. 24. To the same effect is American Jurisprudence, stating that the exca-

CONCLUSION

The issues presented in this petition are important to all persons who may be affected by the construction activities of the Washington subway system. These issues may be difficult to resolve and the price of any fair and equitable adjustment may be costly. The issues involve constitutional rather than statutory or regulatory authority: the governing principles on the taking of property under a constitutional guaranty against government (in the nation's Capital and its metropolitan area) forcing certain persons alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. In denying Anchorage's claim to compensation for subway interference with the use of its office building over a two and one-half year period, the trial court acted unjustly, arbitrarily, and unconstitutionally.

The justifications for the rulings below are in terms of necessity, practicality, convenience—popular demands for defending the reaches of governmental power. An unstated consideration, that "brooding omnipresence," may be the fear of endangering completion of the subway system by opening areas of civil liability. A local judiciary, acting perhaps out of an excessively parochial concern, may prefer to push aside the issues of fairness and justice to property owners. The less said, the unpublished one-page appellate judgment implies, the better.

The issues of justice and fairness under the Fifth Amendment must be faced squarely and resolved resolutely in the interests of judicial candor and fairness in the common law tradition. They should not be settled by sup-

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vator has an *"absolute duty"* and his liability *"does not depend on negligence"* (emphasis supplied), 1 American Jurisprudence 2 Adjoining Landowners, § 58, p. 732. Moreover, the *"duty of the excavator does not end with completion of the excavation,* he being required to support the adjoining wall by proper foundation so that it shall remain as stable as before" at note 17.

pression of inconvenient facts or deliberate avoidance of "pertinent but uncomfortable authority," *supra*, p. 14, as done here by the courts below, in denial of Anchorage's constitutional rights, substantive and procedural. The courts cannot abdicate their duty under Article III of deciding claims to just compensation under the Constitution in cases arising from the Washington subway construction. The fact that such decision may result in additional costs to the subway system excuses not.

The Constitution requires nothing less.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 171-72

[Filed June 14, 1973, James F. Davey, Clerk]

ANCHORAGE OFFICE BUILDING, INC., *et al.*,
Plaintiffs,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Defendants.

ORDER

This matter comes before the court on the separate motions to dismiss or, in the alternative, for summary judgment, submitted by each of the two defendants, the Washington Metropolitan Area Transit Authority (WMATA) and S.A. Healy & Co. The court has considered the memoranda and supplemental memoranda submitted in support of the defendant's motions and has considered the plaintiffs' memoranda, including their consolidated statement, submitted in opposition thereto.

The plaintiffs are the owners of the Anchorage Office Building which is located on the southeast corner of the Connecticut Avenue and "Que" Street, N. W. intersection in the District of Columbia. This action arises out of the planning and construction of a vent shaft which is needed for the Metro subway station to be located at Dupont Circle. The vent shaft has been located in front of plaintiffs' building and plaintiffs claim damages as a result of its location and construction.

In their complaint, the plaintiffs allege that for nine months barricades set up by the defendants in order to accomplish the construction completely cut off direct access between the building and Connecticut Avenue and between the building and Que Street, and that as a result thereof, access to and from Que Street was limited to a dark, wooden walkway which led only to 19th Street, approximately one-half block to the east. It is further alleged that display windows of the street level retail shops located in the building were completely blocked off by the barricades, that deliveries to the building were made unduly difficult, and that other conditions, which generally caused serious and unreasonable interference with the normal operation of the building, remained for approximately 1½ years. The plaintiffs also allege that the defendant WMATA failed to adequately consider alternative sites for the vent shaft and that at least one of these sites, a triangular plot of land belonging to the National Park Service, could have been used. In addition, plaintiffs allege that the noise, explosions, dust and smoke from the construction constituted a public and private nuisance which, in turn, was aggravated by the poorly chosen location of the vent shaft. Finally, plaintiffs allege that there was an unnecessary and unreasonable delay in the completion of construction.

Defendant S.A. Healy & Co. argues in its motion that it has been operating totally within the authority of its contract and its actions were reasonable in view of the nature of the job. Because of the unanticipated rock conditions it discovered when work commenced, it argues that the work was not unnecessarily delayed.

Defendant WMATA also argues that the delay was reasonable in view of the unforeseen site conditions. It further claims that a decision on the location of the vent shaft was made only after a careful planning and review of all the alternative sites including an examination into

the feasibility of using the triangular piece of parkland already referred to. WMATA also raises the affirmative defense of sovereign immunity arguing that the decision as to the location of the Que Street vent shaft is a governmental function involving a policy determination thereby making WMATA immune from suits challenging this decision.

First, the court is not persuaded that the doctrine of sovereign immunity can be applied to WMATA's decision to locate the vent shaft in front of the plaintiffs' building. Section 80 of the interstate compact which provided for the establishment of the WMATA, P.L. 89-774, 80 Stat. 1324, 1350 obviously intended to abrogate, at least partially, WMATA's immunity from tort liability. Merely because a governmental agency carries on an activity—in this case the construction of a vent shaft—this activity does not become immune from suit. *Spencer* v. *General Hospital of the District of Columbia*, —— U.S. App. D.C. ——, 425 F.2d 479 (1969); *Meyers* v. *District of Columbia*, 17 F.R.D. 216 (D.D.C. 1955); *District of Columbia* v. *Totten*, 55 U.S. App. D.C. 312, 5 F.2d 374, *cert. denied* 269 U.S. 562 (1925); *Restatement on Torts, 2d* § 895 (Tent. Draft No. 19, 1973).

Second, plaintiffs have alleged sufficient facts to support a cause of action for interference with their rights of easement for access, light, and air, complaint ¶¶ 10-15, and for public and private nuisance, complaint ¶¶ 16-20. See *Prosser*, Handbook on Law of Torts § 88 (3d ed. 1971); *R. Powell, The Law of Real Property* ¶¶ 410, 413, 420; *Restatement of Property* § 450; *District of Columbia* v. *Totten, supra; Marzo* v. *Seven Corners Realty, Inc.*, 171 F.2d 144 (D.C.C. 1948).

Finally, with respect to defendants' motion for summary judgment, plaintiffs raise several material issues of fact which remain in dispute. Summary judgment is a

judgment in bar that results from application of substantive law to facts that are established beyond reasonable controversy. 6 *J. Moore, Federal Practice* ¶ 56.11 [1.0] at 2143. The burden is on the movant and any reasonable doubt as to the existence of a genuine issue of fact should be resolved against the movant. *Dewey* v. *Clark*, 180 F.2d 766 (D.C.C. 1950); 6 *J. Moore, supra* ¶ 56.02[1]. Since the record indicates that material facts necessary to resolve the questions raised in this case are still in dispute, summary judgment should be denied.

It is, therefore, this 14th day of June, 1973,

ORDERED, that defendant WMATA's motion to dismiss or, in the alternative for summary judgment, be, and it hereby is, denied; and it is further

ORDERED, that defendant S.A. Healy & Co.'s motion to dismiss or, in the alternative for summary judgment, be, and it hereby is, denied.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 171-72

[Filed Sep. 20, 1973, James F. Davey, Clerk]

ANCHORAGE OFFICE BUILDING COMPANY, *et al.*,
Plaintiffs,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et. al.*,
Defendants.

ORDER SEPARATING TRIAL ON ISSUE OF DAMAGES FROM TRIAL ON THE ISSUE OF LIABILITY

It appearing that separate trials on the issue of liability and on the issue of damages will be conducive to expedition and economy in this case; F. R. Civ. P. 42(b), it is this 19th day of September, 1973,

ORDERED, that the issue of liability be bifurcated from the issue of damages and be separately tried in advance of the trial on the issue of damages.

/s/ Thomas A. Flannery
United States District Judge

A-6

UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
Washington, D. C. 20001

Room #1205

ARTHUR L. BURNETT
U. S. Magistrate

February 27, 1974

Mr. Clifford J. Hynning
1555 Connecticut Avenue, N.W.
Suite 301
Washington, D. C. 20036

Dear Mr. Hynning:

In connection with your telephone conversation with me on February 27, 1974 concerning the pretrial conference scheduled Wednesday, March 13, 1974 at 10:30 A.M. in Anchorage Office Building Company, et al v. Washington Metropolitan Area Transit Authority, Civil Action Number #171-72 and your representation that Judge Flannery had granted a bifurcated trial on the issues of liability and damages, trial as to liability only to be held first, special damages need not be included in the pretrial statements required: a subsequent pretrial on the issue of damages can be held later if the plaintiff is successful on the issue of liability.

As to liability, the pretrial statement must set forth particular facts in detail as to grounds for liability. If the grounds for liability are novel or controversial legal precedent should be cited.

With reference to stipulations and an agreed statement of facts, the pretrial statements should set forth all such matters as to which there is no dispute. Counsel are

instructed also to have a prepared list of purposed exhibits to be offered at trial, the list identifying the exhibits and furnishing a brief description sufficient to identify the exhibit at trial.

The instructions herein superseded the instructions initially sent scheduling the pretrial and apply to all parties.

Sincerely,

/s/ Arthur L. Burnett
ARTHUR L. BURNETT
United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 171-72

[Filed Oct. 2, 1974, James F. Davey, Clerk]

ANCHORAGE OFFICE BUILDING COMPANY, *et al.*,
Plaintiffs,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

and

S. A. HEALY & COMPANY,
Defendants and Third-Party Plaintiff,

v.

SPENCER, WHITE & PRENTIS, INC.,
Third-Party Defendant.

MEMORANDUM

This action was brought by the plaintiffs to recover damages from the Washington Metropolitan Area Transit Authority under several different theories of liability for interference with easement, public and private nuisance, and absolute liability under the District of Columbia Building Code. The case came on for trial on September 16 and 17, 1974. Plaintiffs put on their case in chief and formally rested.[1] Defendant, Washington Metropolitan Area Transit Authority (WMATA), has moved to dismiss the action pursuant to Rule 41(b) of the

[1] Prior to completion of their case, plaintiffs dismissed with prejudice their claim against deefndant S. A. Healy & Company. S. A. Healy & Company thereafter dismissed its third-party complaint against Spencer, White & Prentis, Inc.

Federal Rules of Civil Procedure, asserting that upon the facts and the law the plaintiffs have shown no right to relief. This Opinion constitutes the court's findings of fact and conclusions of law with respect to defendant's motion to dismiss.

The complaint in this matter, as summarized by the court in its Order entered herein on June 14, 1973, and apparently adopted by the plaintiffs as an accurate statement of their factual allegations, asserts the following:

1. For nine months, barricades set up by the defendant completely cut off direct access between the Anchorage Office Building and Connecticut Avenue, and between that building and Que Street; and that as a result thereof access to and from Que Street was limited to a dark wooden walkway which led only to 19th Street;

2. Display windows of the street level retail shops were completely blocked by barricades; that deliveries to the building were made unduly difficult and that other conditions existed that caused serious and unreasonable interference with normal operation of the building;

3. That WMATA failed to adequately consider alternate sites for the vent shafts;

4. That noise, explosion, dust and smoke caused a public and private nuisance which was aggravated by choice of location; and

5. That there was unnecessary and unreasonable delay.

The court, in its Order of June 14, 1973 stated that these allegations, if supported by evidence at trial, constituted a cause of action for interference with easement and public and private nuisance.

The court also has considered whether the evidence adduced at trial is adequate to sustain absolute liability under the District of Columbia Building Code, Article

22, Section 3-786, although that cause of action was not included in plaintiffs' pretrial statement and is not properly before the court.[2]

After listening to the evidence presented, carefully reviewing the entire transcript of the case and all of the exhibits which were introduced, and after drawing all legitimate and reasonable inferences in a light most favorable to the plaintiffs, the court is prepared to state that the evidence tended only to establish the following:

1. Plaintiffs are the owners of the Anchorage Office Building located on the southeast corner of Connecticut and Que Streets, N. W., in the city of Washington, D. C.;

2. From mid-1970 until late 1972 or early 1973, WMATA or their independent contractor engaged in the construction of a segment of the transit system including a vent shaft located in public space on the southeast corner of Que Street, N. W., in the sidewalk next to the Anchorage Office Building;

3. From August, 1970 through October, 1970, WMATA or their independent contractor engaged in underpinning the Anchorage Office Building. The underpinning was delayed from mid-March, 1970 until August, 1970 in order that plaintiffs' permission could be obtained.

4. By letter from plaintiff Hynning to General Jackson Graham, General Manager of WMATA, dated July 7, 1970, as amended July 17, 1970, plaintiffs consented to the underpinning. That letter, plaintiffs' Exhibit No. 5, states in pertinent part:

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[2] Defendant vigorously has argued that this court cannot consider plaintiffs' claim under Article 22. The defendant is correct in pointing out that this theory for relief appears nowhere in plaintiffs' pretrial statement or in the Magistrate's summary of plaintiffs' theories for recovery. The court has included a discussion of this theory only because plaintiffs, even though permitted to proceed on this theory, have failed completely to support its application by introduction of evidence.

> Accordingly, I am prepared to consent to the underpinning of my property in accordance with the provisions of your letter of July 6, 1970, provided that at all times, except as noted below, your contractors will provide a covered walkway, four feet width and eight feet height, runing along Que Street from Connecticut Avenue to 19th Street. I recognize that during the limited time period which your staff has estimated at approximately 105 days, construction activities will be of such a nature that it will be impossible to safely maintain such a walkway. . . . During this time of necessity, which is limited to 105 days in duration, I will waive the above requirements of an entranceway from Connecticut Avenue.

5. During the underpinning activity, a period of approximately 90 days, there was no direct access to the Anchorage Office Building from Connecticut Avenue along Que Street; it was necessary during this phase of construction to enter the Que Street entrance from 19th Street;

6. In November, 1970, defendant WMATA or their independent contractor constructed a covered pedestrian walkway pursuant to plaintiffs' request and to afford protection to the public. Thereafter, except for brief periods in 1972, there was direct access to the Anchorage Office Building from Connecticut Avenue;

7. The construction activities never completely barred access to the Anchorage Office Building, but did make access less convenient;

8. Some persons declined to use the covered walkway;

9. During the construction period, some retail shops in the building were behind barricades. Some tenants complained of noise, explosions and interference. Tenants were more difficult to find because of the construction;

10. During the construction period, there were loud explosions which jarred the Anchorage Office Building. These explosions did not break any windows, but did dislodge putty from glass windows, cause paint to chip and allegedly broke fixtures on certain French-type doors;

11. In 1973 it was discovered that a window of one store had settled below a level which existed at some unspecified prior time;

12. Barricades were attached to the Anchorage Office Building with steel pins;

13. Construction of the vent shaft was scheduled to be completed in July, 1971 but was not completed until late 1972 or early, 1973. All barricades and the walkway were removed in late 1972 and sidewalks were replaced in early 1973; and

14. Although plaintiffs alleged that there were two alternative locations for the vent shaft other than the site adjacent to the Anchorage Office Building, plaintiffs were unable to show that either site was an available alternative. Rather, the evidence tended to show that the National Park Service would not permit the use of parkland at the northwest corner of Connecticut Avenue and Que Streets; and that the rock conditions and the proximity of the escalator shaft prohibited use of the southwest corner of Connecticut and Que Streets.

Apparently, plaintiffs have argued that the prolonged interference with their rights of easement to access over sidewalks and streets, to light and to air constitutes a taking without compensation. These allegations are set forth on page 7 of plaintiffs' pretrial statement. The plaintiffs have failed to introduce evidence of the type of serious deprivation which is required in order to constitute a taking under the Fifth Amendment. Plaintiffs have failed to show that any deprivation which they sustained was of such a permanent or complete nature

as to require granting compensation to them. In addition, the evidence, as presented in plaintiffs' Exhibit 5, indicates that the plaintiffs consented to much of this interference. Finally, plaintiffs have failed to show that the construction was unduly or unreasonably prolonged, such as to continue interference with business for an unnecessary length of time. *See Meyers* v. *District of Columbia*, 17 F.R.D. 216, 217 (D.D.C. 1955).

The general rule regarding temporary obstruction of property has been stated in 2A J. Sackman, *Nichols' The Law of Eminent Domain* § 6.444[2] (1974):

> When a street is so obstructed during the construction of a public work that access to abutting property is wholly cut off, the fact that the injury is only temporary is generally held to be no reason for denying the owner compensation. However, when access, though rendered difficult and inconvenient, is not wholly cut off, the owner is denied compensation. This is so even if there is such an injury to the use of the property for business purposes during the construction of the work as to materially affect the value of the leasehold interests, and this injury is due to the presence of structures in the street that would undoubtedly constitute a ground for compensation if they were maintained there permanently. This rule is hard to defend on principle. But the impossibility of constructing a subway or a sewer or of laying a water-pipe in the streets of the business section of a city without in some degree interfering with access to abutting property, and the consequent danger of a multiplicity of suits from the determination of which it might be impossible as a practical matter to exclude mere damage to business, have led the courts to reject claims of this character as a matter of public necessity.
>
> However, if as a result of negligence, the time for the completion of the project is unduly and unreasonably prolonged, thereby continuing interfer-

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> ence with business for an unnecessary length of time, a cause of action for damages arises against the government. The inconvenience and damage which a property owner suffers from temporary obstructions are incident to city life and must be endured. The law gives him no relief, recognizing that he recoups his damage in the benefit which he shares with the general public in the ultimate improvement which is being made. However, if the temporary obstruction is a result of unreasonable, unnecessary, arbitrary or capricious acts or conduct by the one in charge of the improvement or construction, the abutting landowner has a right of action for damages resulting from such interference with access to his property. (citations omitted).

This court had occasion to consider the allegation of a taking with regard to the construction of the Dupont Circle underpass in *Meyers* v. *District of Columbia*, 17 F.R.D. 216 (1955). In *Meyers* Judge Holtzoff stated:

> Obviously, improvements of this nature are necessary from time to time and Governmental authorities would be derelict in their duties if they did not recognize the need for them when it arises and act upon it. Consequential damages to adjoining property owners in the way of diminution of business while construction is in progress, does not constitute a taking of property for which compensation must be made under the Fifth Amendment . . . Such losses must be borne by the individual as part of the price that he pays for being a member of organized society and living in an urban community. 17 F.R.D. at 217.

The court concludes that the evidence of interference in this case, as in *Meyers*, is not such as to constitute a taking for which compensation must be made. *See also*, *Richards* v. *Washington Terminal Co.*, 233 U.S. 546, 58 L.Ed. 1088 (1914); *Baltimore & Potomac RR Co.* v.

Fifth Baptist Church, 108 U.S. 317, 27 L.Ed. 739 (1883).

The plaintiffs advance a further theory of relief by alleging that defendant's actions have created a public and a private nuisance. Plaintiffs acknowledge that this theory is really part of their larger theory that the interference with access constituted a taking without compensation.[3]

The factual allegations made by plaintiffs in reference to the existence of a public and a private nuisance are that the ingress and egress to plaintiffs' building were interfered with and that blasting and other construction activities loosened the putty, paint, and window fixtures in their building. The plaintiffs, however, have not succeeded in establishing that the interference with ingress and egress was a substantial or unreasonable interference with their property. Since the plaintiffs consented to 105 days with no access to their building from Connecticut Avenue, they cannot be heard to complain that 90 days with no access was unreasonable. Plaintiffs have not shown that defendants' selection of the site where construction was to occur was unreasonable because of the presence of feasible alternate sites which would not cause damage. *See Baltimore & Potomac R.R. Co.* v. *Fifth Baptist Church, supra.* Even though the plaintiffs have shown that the construction period was extended, they have failed to prove that this delay was unreasonable or unnecessary. As in *Meyers* v. *District of Columbia, supra,* no interference with ingress and egress due to unreasonable

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[3] Since the Metro construction was authorized by act of Congress, it appears *doubtful* that the construction could constitute a public nuisance. *See Richards* v. *Washington Terminal Co.*, 233 U.S. 546, 552 (1914). *See generally* W. Prosser, *Law of Torts* 606-07 (4th ed. 1971). Of course, just because the construction was authorized by Congress and cannot constitute a nuisance does not mean that private recovery cannot be obtained. *See Richards* v. *Washington Terminal Co., supra.*

and unnecessary delays in construction existed to form the basis of an award of damages. Thus, the plaintiffs have failed to establish a *prima facie* case.

As to the putty, paint, and window damage, the plaintiffs have failed to present any evidence that they suffered any damage different from that sustained by the general public. Prosser, in his work on torts indicates that: "There is general agreement on the requirement that the plaintiffs' damage be different in kind, rather than in degree from that shared by the general public." W. Prosser, *Law of Torts*, 587 (4th ed. 1971). A large part of Connecticut Avenue was subject to Metro construction during this period, a fact of which the court takes judicial notice. The plaintiffs have shown no evidence to indicate that other buildings were not also jarred by the blasting. In addition, on the evidence presented, the jarring suffered by the plaintiff cannot be considered as substantial interference. Rather, the jarring is like those inconveniences referred to by the court in the *Meyers* case as the price which people must pay for public improvements. The jarring to the plaintiffs' building can also be compared with the vibrations caused by the movement of the trains in the track which resulted in cracking of walls and wallpaper, the breaking of windows, and the disturbance to the peace of the occupants of the house which the Court in *Richards*, *supra*, indicated were incidental damages not necessitating the granting of compensation. Finally, it must be noted that the plaintiffs withdrew their allegations of damage to their building caused by the defendant's negligent construction activities. (Tr. at 321-22).

The plaintiffs further have alleged that the defendant engaged in ultrahazardous activity by its blasting work. Even in ultrahazardous activity, inquiry into the reasonableness of the defendant's conduct is required. Hence, Prosser states that: "The abnormal character of the en-

terprise itself will depend upon the place and the manner in which it is carried on, the harm which is inflicted or threatened, and the general utility of the defendant's conduct . . ." Prosser, *Law of Torts*, 583, *supra*. In this case, the plaintiffs have done no more than to argue that the defendant engaged in ultrahazardous activity. No evidence was introduced as to the dangers involved or the harm threatened. Plaintiffs have not even established the precise location of the blasting or that the blasting was done by WMATA contractors. Plaintiffs plainly have failed to show that the defendant's activity was unreasonable or ultrahazardous under the facts in this case.

Plaintiffs' final theory of recovery is based on absolute liability arising under Article 22 of the D. C. Building Code.[4] The plaintiffs have asserted that their building settled due to the underpinning and that absolute liability attaches to the defendant's activity when doing this work. Plaintiffs, however, have failed to introduce any evidence that the defendant caused the alleged damage and have thus failed to sustain their burden of proving causation. Without presenting evidence of causation, the plaintiffs have failed to make out a *prima facie* case on this theory.

For the foregoing reasons, the court finds that the plaintiffs have failed to carry their burden to establish a *prima facie* case on any of their theories of recovery. Therefore, the court will grant the defendant's motion to dismiss under the provisions of Rule 41(b) of the Fed-

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[4] In pertinent part the underpinning provision provides:

> Whenever excavation is carried to a depth which is below the adjoining premises, the person who causes such excavation to be made shall, if given the written permission to enter the adjoining premises, at all times and at his own expense, preserve and protect from injury any structure the safety of which may be affected by such part of the excavation, and such person shall provide support for the adjoining structure by proper foundations.

eral Rules of Civil Procedure. An appropriate judgment accompanies this Memoradum.

/s/ Thomas A. Flannery
United States District Judge

Date: October 2, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 171-72

[Filed Oct. 2, 1974, James F. Davey, Clerk]

ANCHORAGE OFFICE BUILDING COMPANY, *et al.*,
Plaintiffs,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
and S. A. HEALY & COMPANY,
Defendants and Third-Party Plaintiff,

v.

SPENCER, WHITE & PRENTIS, INC.,
Third-Party Defendant.

JUDGMENT

This matter came for trial before the court without jury on September 16, 1974. At the conclusion of plaintiffs' case, defendant moved to dismiss pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. It appearing that upon the facts and the law that plaintiffs have shown no right to relief, it is this 2nd day of October, 1974,

ORDERED that defendant's motion to dismiss be, and the same hereby is, granted; and it is further

ORDERED and ADJUDGED that judgment be entered for defendant with costs assessed to plaintiffs.

/s/ Thomas A. Flannery
United States District Judge

NOT TO BE PUBLISHED—SEE LOCAL RULE 8(b).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 75-1001
Civil Action No. 171-72

[Filed Dec. 3, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

[No Opinion]

ANCHORAGE OFFICE BUILDING COMPANY, *et al.*,
Appellants

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, McGOWAN, and WILKEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by court. *See* Local Rule 13(c).

This court is unable to say that the District Court's findings of fact are clearly erroneous. *See* Rule 52(a),

FED. R. CIV. P. Nor are we able to find legal error requiring reversal of its judgment. *See* 28 U.S.C. § 2111 (1970); Rule 61, FED. R. CIV. P.

On consideration of the foregoing, it is ORDERED AND ADJUDGED by this court that the judgment of the District Court appealed from in this case is hereby affirmed.

PER CURIAM

FOR THE COURT

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Case No. 75-1287

ANCHORAGE OFFICE BUILDING COMPANY,
A Limited Partnership,
and
ANCHORAGE-HYNNING & Co., A Limited Partnership,
and
CLIFFORD J. HYNNING, Trustee for and Managing
General Partner of said Limited Partnerships,
Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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OCTOBER TERM, 1975

Case No. 75-1287

ANCHORAGE OFFICE BUILDING COMPANY,
A Limited Partnership,
and
ANCHORAGE-HYNNING & Co., A Limited Partnership,
and
CLIFFORD J. HYNNING, Trustee for and Managing General Partner of said Limited Partnerships,
Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COUNTER-STATEMENT OF THE CASE

This case involves the planning and construction of the rapid rail transit system in the nation's capital. Petitioners claim that as a result of construction activities by the Washington Metropolitan Area Transit Authority's [1] independent contractor, their property was taken without just compensation and that

[1] Hereinafter, WMATA.

WMATA maintained a public and/or private nuisance. They also claimed that there was an alternative location for the vent shaft constructed adjacent to their property. Finally, Petitioners assert a theory of absolute liability based on the District of Columbia Building Code.

At the close of Petitioners' case in the trial court, Respondent WMATA moved to dismiss Petitioners' case pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Thereafter the Court did dismiss, finding that Petitioners had failed to establish a *prima facie* case on any theory. Judge Flannery denied Petitioners' Motion for a new trial. The United States Court of Appeals for the District of Columbia affirmed without opinion.

REASONS FOR DENYING THE WRIT

1. There Is No Legal Issue To Be Resolved on Certiorari

The case law controlling the present case has been settled for decades. There is no conflict to be resolved on certiorari. Petitioners rely primarily upon a theory of a constitutional taking under the Fifth Amendment. However, their evidence tended to prove only the partial, temporary interference which necessarily resulted from WMATA construction in public space. Decisions of this Court and the District of Columbia courts are in accord that a partial temporary interference is not a taking but is *damum absque injuria.*

As early as 1857, in the case of *Smith* v. *Corporation of Washington,* 61 U.S. 135 (1857), this Court held that since the City of Washington had authority to change the grade of the street in front of plaintiff's property, the city was not liable in damages for inconvenience and expense to the plaintiff occasioned by

that construction. See also *Osborn* v. *District of Columbia,* 63 App. D.C. 277, 72 F.2d 70 (1934); *Ralph* v. *Hazen,* 68 App. D.C. 55, 93 F.2d 68 (1937).

Similarly, in *Northern Transportation Co.* v. *Chicago,* 99 U.S. 635 (1879), this Court held that the construction by the City of Chicago of a tunnel under the Chicago River, even though it completely blocked access to plaintiff's docks and forced plaintiff to rent other docks, was not a taking within the meaning of the constitutional provision. See also *George Washington Inn, Inc.* v. *Consolidated Engineering Co.,* 64 App. D.C. 138, 75 F.2d 657 (1935); *Lund* v. *St. Paul,* 31 Wash. 286, 71 P. 1032, 61 L.R.A. 506 (1903); *Farrell* v. *Rose,* 253 N.Y. 73, 170 N.E. 498 (1930).

Finally, the most recent reported case in the District of Columbia is *Meyers* v. *District of Columbia,* 17 F.R.D. 216 (D.D.C. 1955). On defendant's motion for summary judgment in that case, the United States District Court held that absent some evidence of negligence or unreasonable delay, plaintiffs could not recover for the interference with their business which resulted from construction of an underpass under Dupont Circle.

As may be gleaned from the *Meyers* case, *supra,* there are two exceptions to the rule that consequential damages to an adjoining property owner due to a public improvement are noncompensable. The first is if the construction at issue is beyond the authority of the public body performing it.[2] Petitioners here neither alleged nor attempted to prove that Repsondent

[2] See also *Smith* v. *Corporation of Washington,* 61 U.S. 135 (1857); *Northern Transportation Company* v. *Chicago,* 99 U.S. 635 (1879).

WMATA was not authorized to construct portions of the transit system adjacent to Petitioners' property. The second basis for liability arises if the construction is negligently performed or negligently delayed.[3] Petitioners withdrew their allegations of negligence (Tr. pp. 321-322), dismissed their case against the contractor (Tr. p. 322), and failed to introduce any evidence that the alleged delay was unreasonable or negligent (Memorandum Opinion, U.S. District Court for the District of Columbia, dated October 2, 1974, reprinted in Petitioners' Brief, p. A-8; hereinafter Memorandum Opinion).

The cases cited by Petitioners in support of the proposition that the Anchorage property was "taken" without just compensation in violation of the Fifth Amendment to the United States Constitution are inapposite. The cited cases deal with permanent deprivation of all or part of a plaintiff's property.[4] Respondent concedes that had it erected barricades depriving Petitioners of access to their building forever, Respondent would have "taken" it. See *Brownlow* v. *O'Donoghue Brothers, Inc.*, 51 App. D.C. 114, 276 F. 636 (1921). Unlike *Brownlow, supra,* or *Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (1914), the interference here complained of was partial and temporary. Petitioners have cited no case in any jurisdiction, and Respondent knows of none, where a partial temporary

[3] See also *Lund* v. *St. Paul*, 31 Wash. 286, 71 P. 1032, 61 L.R.A. 506 (1903); *Farrell* v. *Rose*, 253 N.Y. 73, 170 N.E. 498 (1930).

[4] See, *e.g.*, *Armstrong* v. *United States*, 364 U.S. 40 (1960); *Pumpelly* v. *Green Bay Co.*, 80 U.S. 166 (1872); *Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (1914); all cited by Petitioners.

interference during a public works project was held to be a taking under the Fifth Amendment. In any event, the law in this jurisdiction is clear and there is no conflict to be resolved by this Court on a writ of certiorari.

Petitioners also assert but did not prove a cause of action based on a nuisance theory. The law on nuisance is equally well settled. In order to establish a claim for public or private nuisance, Anchorage had to have proved a substantial interference with their property rights, unreasonable conduct or activity on the part of WMATA, and avoidability of the harm caused. W. L. Prosser, *Handbook of the Law of Torts,* Ch. 15, pp. 577-583 (4th ed. 1971), *passim.* A recovery for private nuisance requires a showing, in addition to the elements above, that the interference was not outweighed either by the social utility of defendant's conduct or the public interest. Prosser, pp. 596-599 *passim.* To recover for a public nuisance, plaintiffs have the further burden of proving that the damage to them was different, both in kind and degree, from that suffered by other members of the public. Prosser, pp. 586-587. *Meyers* v. *District of Columbia,* 17 F.R.D. 216 (D.D.C. 1955).

In addition, Petitioners asserted a somewhat amorphous theory based on their allegation that the vent shaft constructed adjacent to their property should have been located elsewhere. Not only did Petitioners fail to show that there was a superior alternative location for the vent shaft but, even if they had, WMATA's decision on the location of the vent shaft is not a proper subject for judicial review. *Berman* v. *Parker,* 348

U.S. 26 (1954); *Bootery, Inc.* v. *WMATA*, 326 F.Supp. 794 (D.D.C. 1971).[5]

Petitioners' final theory, first advanced at trial, is that Respondent WMATA was absolutely liable under Article 22 of the District of Columbia Building Code. Despite five queries by the trial court to Petitioners' counsel[6] and an opportunity to brief the issue,[7] Petitioners never introduced evidence of causation and never referred the court or opposing counsel to any case which relieved them of the burden of proving who or what caused the damage allaged.

2. This Case Is Not a Proper Vehicle for the Resolution of Any Issue.

There is a second reason for denying the writ. Even if there were important unresolved legal issues in regard to construction of the subway system in Washington, the record in this case is not a proper vehicle for presenting them. Petitioners failed to establish a *prima facie* case on any theory. They failed to introduce evidence sufficient to prove a constitutional taking or even a substantial interference. They showed only that ingress and egress to the Anchorage Building was via a covered walkway installed at Petitioners' request and that tenants complained and were more difficult to find during the construction period (Memoranda Opinion, pp. A-10, 11). Moreover, Peti-

[5] As an agency and instrumentality of the three signatory jurisdictions (Washington Metropolitan Area Transit Authority Compact of 1966, PL 89-774, 80 Stat. 1324, note following D.C. Code 1-1431) engaged in a public works project, WMATA's planning decisions are not subject to challenge unless they are arbitrary, capricious, or irrational.

[6] Tr. pp. 205, 206, 210, 284 and 288.

[7] Tr. p. 295.

tioners acknowledge that access was never completely barred (Petition, p. 6) and withdrew their allegations of negligence (Tr. pp. 321-322).

Again, Petitioners proved only the facts set forth above and did not prove substantial or unreasonable interference to support a nuisance claim. In addition, Petitioners were unable to show that the harm they suffered was any different from the harm suffered by other members of the public (Memorandum Opinion, p. A-16). Finally, even if Petitioners had shown a substantial interference with their property, the interference would be *damnum absque injuria,* under the case law precedent cited above, in the absence of evidence of negligence or negligent delay.[8]

Therefore, if there are any issues of constitutional dimension raised by WMATA construction, of justice and fairness under the Fifth Amendment, they should be reviewed by this Court in an appropriate case where each element upon which liability is predicated has been proved in the trial court. This is not such a case.

3. Petitioners Had a Fair Trial.

Petitioners have described a number of actions and rulings of the trial judge which they believe denied them a fair trial. Contrary to Petitioners' lengthy description of the trial of this case, the trial judge gave Petitioner Hynning countless opportunities to rectify glaring deficiencies in his case. The transcript of the trial reveals that Judge Flannery bent over backwards to aid Mr. Hynning, who appeared *pro se* and on behalf of other Petitioners. While none of Petitioners' arguments on these rulings would justify

[8] *Meyers* v. *District of Columbia,* 17 F.R.D. 216 (D.D.C. 1955).

a review of the trial court's action by this Court on a writ of certiorari, Respondent here briefly reviews several of the points raised in order to correct certain misstatements by Petitioners.

Petitioners are apparently convinced that the trial judge denied them a fair trial by bifurcating the trial, refusing to hear evidence of damages, and then ruling that they had failed to prove particular harm. This argument is the illogical conclusion of a faulty premise; that is, Petitioners believe that a trial which is bifurcated into one on liability and one on damages relieves the Respondent in that trial of the necessity of proving harm as an element of liability. Obviously the fact of harm, as distinguished from the quantum of damages, is a necessary element in most, if not all, tort claims. In addition, in proving a claim for public nuisance, a plaintiff must prove particular harm, or as Judge Flannery stated it in the trial court below—"damage different from that sustained by the general public" (Memorandum Opinion, p. A-16). Petitioners introduced *no* evidence of particular harm.[9]

Petitioners also assert that Judge Flannery discarded the law of the case. Reduced to its simplest form, Petitioners' argument is that having held in 1973 that Petitioners' Complaint stated a cause of action, the trial judge was precluded, by the law of the case, from holding in 1974 that Petitioners failed to prove that cause of action. Judge Flannery simply afforded Petitioners the opportunity, if they could, to

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[9] The Answer to Plaintiffs' Interrogatory No. 13, which Petitioners believe shows particular harm, was never offered into evidence by Petitioners. (Tr. p. 314). Even if it had been offered and admitted, it showed nothing.

prove permanent denial of access, negligent delay, arbitrary or capricious actions, particular harm, causation and other essential elements of liability. Suffice it to say that if Petitioners were persuasive in this argument, there would be no need for trials since stating a claim would automatically entitle a plaintiff to judgment on the merits.

Finally, Petitioners challenge the trial court's finding that they consented to much of the interference they endured and that the underpinning activity lasted 90 days. Petitioners themselves introduced the evidence of consent (J.A., p. 223) and the evidence of the duration of underpinning (J.A., pp. 194, 211, 217). Petitioners are bound by their own evidence. Moreover, neither finding of fact is prejudicial even if either had been erroneous. A finding of no consent by the trial judge would not have supplied the deficiencies in Petitioners' *prima facie* case. A finding that the underpinning lasted five years would not have established a *prima facie* case in the absence of proof that a five-year delay was unreasonable or negligent. *Meyers* v. *District of Columbia,* 17 F.R.D. 216 (D.D.C. 1955); *Farrell* v. *Rose,* 253 N.Y. 73, 170 N.E. 498 (1930).

No recitation of authority is necessary to show that Petitioners must prove causation in order to prevail on a claim of absolute liability under Article 22 of the D. C. Building Code.

CONCLUSION

The Petition for Certiorari presents no important legal issue for this Court to resolve. Even if any issues remain uresolved in connection with Metro construc-

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tion, this record would not be an appropriate vehicle. Petitioners received a fair trial and failed to prove a case. Therefore, the Petition should be denied.

Respectfully submitted,

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